**From:** Jerry Ponko
**To:** Microsoft ATR
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**Subject:** Microsoft Settlement

As an IT professional for the past fifteen years I would like to say
that I am opposed to the Proposed Final Judgement (PFJ). The PFJ
prohibits certain behaviors by Microsoft towards OEMs, but curiously
allows the following exclusionary practices:

Section III.A.2. allows Microsoft to retaliate against any OEM that
ships Personal Computers containing a competing Operating System but no
Microsoft operating system.

As anectdotal evidence of Microsoft's past anti-competitive behavior
against a small OS competitor, Be Inc., I present a quote from an
article <http://www.byte.com/documents/s=1115/byt20010824s0001/
0827_hacker.html> by Byte Magazine's Scot Hacker:

"With so little profit margin in the computer retail business, and with
so little to set one brand of computer apart from another, it would
seem that out-of-the-box dual-boot capabilities would be a tremendous
differentiating factor for hardware vendors. It would seem that there
would be financial incentives for computer vendors to be asking Be for
10,000-license deals. These bundling arrangements would be good for Be,
good for OEMs, and good for consumers.

In his own column, Gassée has written several times about Microsoft's
Windows OEM License and the ways in which it limits the freedoms of PC
OEMs. In July 2001, I spoke with Gassée to find out why no dual-boot
computers with BeOS or Linux installed alongside Windows can be
purchased today. In the 1998-1999 timeframe, ready to prime the pump
with its desktop offering, Be offered BeOS for free to any major
computer manufacturer willing to preinstall BeOS on machines alongside
Windows. Although few in the Be community ever knew about the
discussions, Gassée says that Be was engaged in enthusiastic
discussions with Dell, Compaq, Micron, and Hitachi. Taken together,
preinstallation arrangements with vendors of this magnitude could have
had a major impact on the future of Be and BeOS. But of the four,
only Hitachi actually shipped a machine with BeOS pre-installed. The
rest apparently backed off after a closer reading of the fine print in
their Microsoft Windows License agreements. Hitachi did ship a line of
machines (the Flora Prius) with BeOS preinstalled, but made changes to
the bootloader ? rendering BeOS invisible to the consumer ? before
shipping. Apparently, Hitachi received a little visit from Microsoft
just before shipping the Flora Prius, and were reminded of the terms of
the license.

Be was forced to post detailed instructions on their web site

explaining to customers how to unhide their hidden BeOS partitions. It
is likely that most Flora Prius owners never even saw the BeOS
installations to which they were entitled. "

Unsurprisingly, Be Inc. has since gone out of business and Microsoft
has succeeded in crushing another competitor. If a small company like
Be Inc. cannot succeed by giving away its OS for free to OEMs, what
chance is there for any future competitors to Microsoft?

Section III.B. requires Microsoft to license Windows on uniform terms
and at published prices to the top 20 OEMs, but says nothing about
smaller OEMs. This leaves Microsoft free to retaliate against smaller
OEMs, including important regional 'white box' OEMs, if they offer
competing products.

Section III.B. also allows Microsoft to offer unspecified Market
Development Allowances -- in effect, discounts -- to OEMs. For
instance,
Microsoft could offer discounts on Windows to OEMs based on the number
of copies of Microsoft Office or Pocket PC systems sold by that
OEM. In effect, this allows Microsoft to leverage its monopoly on Intel
-compatible operating systems to increase its market share in other
areas,  such as office software, ARM-compatible operating systems, game
consoles and home entertainment systems.
By allowing these practices, the PFJ is encouraging Microsoft to extend
its monopoly in Intel-compatible operating systems, and to leverage it
into new areas.

Some of the remedies that various observers, including me, have thought
appropriate are for Microsoft's preload agreements to be vacated and
new ones prohibited, the opening of Microsoft's office suite data file
formats, and the submission of present and future Microsoft networking
protocols to an independent open standards body.

Since I cannot address the whole PFJ as I want to be brief and time
does not permit, I will state that the PFJ is riddled with loop holes
in Microsoft's favor and does nothing to remedy Microsoft's illegal
monopolist behavior. As it stands now, the PFJ would not be a slap on
the wrist but would grant full permission to Microsoft to do what it's
been doing, and more. Futhermore and curiously, the PFJ does not
address the ill-gotten gains of Microsoft's past illegal monopolistic
activities. How is that possible? Certainly bank robbers would not be
given such generosity!

Sincerely concerned,
Jerold Ponko